

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18146 of Advisory Neighborhood Commission 6A, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator, made August 13, 2010, to grant Certificate of Occupancy No. CO1002994 to 7-Eleven for use as a market in the HS/C-2-B District at premises 801 H Street, N.E. (Square 912, Lot 55).

HEARING DATE: December 7, 2010
DECISION DATE: December 7, 2010

ORDER DENYING APPEAL

This appeal was submitted on September 27, 2010 by the Appellant, Advisory Neighborhood Commission (“ANC”) 6A, whose boundaries encompass the property that is the subject of the appeal. The appeal alleged that the Zoning Administrator (“ZA”) erred in issuing, on August 13, 2010, a certificate of occupancy authorizing use of the subject property as a “market,” because “market” is not defined in the Zoning Regulations and because the business in question “has a non-ancillary use which meets the definition of a ‘fast-food establishment,’” a use permitted only by special exception within the H Street NC Overlay. (Exhibit 1.) Following a public hearing on December 7, 2010, the Board of Zoning Adjustment (“Board”) voted to deny the appeal, with instructions to the ZA to reissue the certificate of occupancy to designate the authorized use as “grocery” consistent with the Zoning Regulations.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated September 30, 2010, the Office of Zoning (“OZ”) provided notice of the appeal to the Office of Planning; the ZA, at the Department of Consumer and Regulatory Affairs (“DCRA”), with copies to Parcel 7 Associates, the owner of the subject property; and to the 7-Eleven Corporation, which leases the property; the Councilmember for Ward 6; ANC 6A, the Appellant and also the ANC in which the subject property is located; and Single Member District/ANC 6A02. Pursuant to 11 DCMR § 3112.14, on October 4, 2010, OZ mailed letters providing notice of the hearing to the Appellant (as well

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as to ANC 6A), to the ZA, and to the owner and lessee of the subject property. Notice was also published in the *D.C. Register* on October 8, 2010 (57 DCR 9415).

Party Status. The Appellant, DCRA, and the owner of the subject property, Parcel 7 Associates, were automatically parties in this proceeding.¹ The Board granted a request to intervene from 7-Eleven as the lessee of the subject property and operator of the business in question, but denied a request for intervenor status submitted by Dan Goldburt, who lives on 10th Street near the subject property, on the ground that the concern raised by Mr. Goldburt, pertaining to trash generated by the use of the subject property, was not germane to issues raised in the appeal. There were no other requests for party status.

The Appellant's case. The Appellant argued that the certificate of occupancy issued to the subject property should be revoked because “market” – the use purportedly authorized by the certificate of occupancy – was not permitted by the Zoning Regulations, and because the business required a certificate of occupancy that would authorize use as both a grocery store and a fast-food establishment, the latter subject to approval as a special exception. According to the Appellant, the business has a “second non-ancillary use” as a fast-food establishment in addition to the grocery store use, citing sales of “fast-food items including chicken wings, pizza, burritos and hotdogs for immediate off-premises consumption” and the layout of the store, which has “a service counter with no seating [that] requires customers to pay for their food before it is consumed” but “does not possess an on-premises dishwasher and uses disposable tableware.” (Exhibit 1.) The Appellant contended that since the fast-food establishment use exceeded 15% of the use of the property, it was not clearly subordinate to the principal use of grocery store, and therefore the business at the subject property should be required to seek a special exception and a certificate of occupancy authorizing fast-food establishment use as well.

DCRA's case. DCRA presented testimony by Matthew LeGrant, the ZA and an expert in zoning matters. The ZA testified that the certificate of occupancy issued to the business at the subject property did not permit operation as a fast-food establishment, but that a grocery store was permitted, consistent with the Zoning Regulations, to sell hot food items. According to DCRA, the certificate of occupancy was not issued in error because the authorized use was one designated by the Construction Codes, while the description of occupancy indicates “convenience store,” a use synonymous with “grocery” and “variety store” and therefore permitted as a matter of right in the HS/C-2-B Zone. DCRA also asserted that the Appellant's contention that the business was operating as a fast-food establishment – that is, outside the scope of its certificate of occupancy – was an enforcement issue not properly before the Board.

Intervenor's case. The Intervenor argued that the ZA did not err in issuing the certificate of occupancy for “market” use, asserting that the business at the subject property “operates within the same business model as the 23 other 7-Eleven grocery stores in the District of Columbia that have been granted certificates of occupancy as either a grocery store or a market.” (Exhibit 20.)

¹ The owner of the subject property did not participate in this proceeding.

FINDINGS OF FACT

1. The subject property is located at 801 H Street, N.E. (Square 912, Lot 55). The property is owned by Parcel 7 Associates and leased to the 7-Eleven Corporation, which operates a business at the property.
2. The subject property is located in the Retail sub-district of the H Street Northeast Neighborhood Commercial Overlay (HS) District, and is zoned HS/C-2-B. A grocery store is permitted as a matter of right in that zone. (*See* 11 DCMR §§ 701.4(l), 1302.2, 1320.3.) A fast-food establishment is permitted only by special exception. (*See* 11 DCMR §§ 1320.4(c).)
3. Certificate of Occupancy No. CO1002994 was issued on August 13, 2010. The “description of occupancy” stated on the certificate is “7-11 convenience store.”
4. The Board credits the testimony of the ZA that “convenience store” is a type of grocery store and a classification synonymous with “grocery store.”
5. The “approved use” designated on the certificate of occupancy is “Markets-M.” “Market” is not a use classification established by the Zoning Regulations.
6. The Zoning Regulations require that a use authorized by a certificate of occupancy must be designated “in terms of a use classification established by this title”; that is, by the Zoning Regulations. (*See* 11 DCMR § 3203.8.)
7. The term “Markets – M” is a designation used in the Construction Codes, Title 12 of the District of Columbia Municipal Regulations. The Board credits the testimony of the ZA that the phrase appears on the certificate of occupancy because that approved use was selected from a drop-down menu used by DCRA’s computer system, which contains primarily uses designated by the Construction Codes.
8. The ZA analyzed a number of factors in making a determination about the proposed use of the subject property, including an assessment as to whether the planned carryout service would be clearly subordinate to grocery use. The Board credits the testimony of the ZA that a grocery store can be distinguished from an eating establishment on the basis of its overall operation, especially considering, for example, whether the business will have a kitchen and be primarily engaged in the preparation of food for immediate consumption, whether seating will be provided for customers, whether retail items will be offered for sale, and the projected use of the space in terms of the percentage of floor area that will be devoted to principal and subordinate uses and projected sales in terms of revenues and items sold.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2008 Repl.), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration the Zoning Regulations. (11 DCMR §§ 3100.2, 3200.2.) In an appeal, the Board may reverse or affirm, in whole or in part, or modify the decision appealed from. (11 DCMR § 3100.4.)

Based on the findings of fact, the Board was not persuaded by the Appellant that an error occurred in the decision of the ZA to issue a certificate of occupancy authorizing use of the subject property as a grocery store and not as a fast-food establishment. However, the Board agrees with the Appellant that the certificate of occupancy must designate a use in terms of a classification established by the Zoning Regulations, and therefore concludes that the certificate of occupancy should be reissued to authorize a “grocery” use rather than the currently designated “market” use.

The Board credits the testimony of the ZA that Certificate of Occupancy No. CO1002994 was properly issued to authorize use of the subject property as a “grocery,” regardless of whether that use was occasionally called a “convenience store” or “market” in the application or on the certificate itself. “Grocery” is a use classification established by the Zoning Regulations and therefore may properly be used to designate the authorized use of a given property.² The ZA explained how the “market” designation occurred as a result of the computer system used at DCRA, and indicated that the certificate could be reissued as an administrative matter with the correct “grocery” designation, without requiring revocation of the existing “market” certificate. The Board concludes that the certificate should be reissued using the “grocery” use classification established by the Zoning Regulations to reflect the authorized use of the subject property.

The Board was not persuaded by the Appellant that the ZA erred in not recognizing that the property would be used, at least in part, as a fast food establishment. As noted by DCRA and by the Intervenor, the Board has previously recognized that a “grocery” may, consistent with the Zoning Regulations, sell certain prepared foods and beverages as an inherent part of the grocery use.³ Thus, sales of food and beverages intended for immediate consumption, including hot

² The appeal sometimes asserted that an error occurred in the issuance of the certificate of occupancy because “a ‘market’ is not *defined* in the zoning regulations” (emphasis added). The Zoning Regulations require that a use authorized by a certificate of occupancy must be *designated* in terms of a use classification established by the regulations, and not necessarily defined in the Zoning Regulations.

³ See Application No. 17906 (*Se Y. Jeong*, order issued August 11, 2009) (no zoning relief necessary for addition of sale of prepared sandwiches, doughnuts, hot coffee, tea, and cooked hot dogs to nonconforming grocery store use in R-4 District); Appeal No. 18031 (*West End Citizens Association*, order issued August 24, 2010) (preparation and sale of simple foods such as sandwiches for off-site consumption is not accessory use “added” to principal grocery store use, but part of that use); and Application No. 18044 (*Rock Creek Market LLC*, order issued April 22, 2010) (limited addition of prepared foods, such as hot beverages, pastries, and cold and grilled panini sandwiches, at grocery store constitutes normal, customary part of grocery store business that will not convert use to prepared food shop or otherwise alter principal grocery store use of property, and does not require zoning relief).

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foods and items typically considered fast food, are not necessarily inconsistent with grocery use or indicate that a business is a fast food establishment in whole or in part.

The definition of “fast food establishment” set forth in § 199 of the Zoning Regulations specifically excludes grocery stores, as well as certain other uses, that provide “carryout service that is clearly subordinate to [the] principal use.”⁴ A use cannot be a grocery and a fast-food establishment simultaneously. Based on Finding of Fact No. 8, in this case, the Board was not persuaded that the ZA should have found that the expected carryout service at the subject property would not be clearly subordinate to the principal grocery use, and therefore finds no error by the ZA in issuing the certificate of occupancy. The Board concludes that the ZA reasonably concluded, under the circumstances, that the proposed use of the subject property would be “grocery” and not “fast food establishment.”

The Board is required to give “great weight” to the issues and concerns raised by the affected ANC. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)). In this case, ANC 6A is the Appellant. For the reasons discussed above, the Board concludes that the ANC has not offered persuasive advice that would cause the Board to find that the certificate of occupancy in question was issued in error.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not satisfied the burden of proof with respect to its claim of error in the administrative decision, made by the ZA on August 13, 2010, to issue Certificate of Occupancy No. CO1002994 to 7-Eleven for use as a “grocery” in the HS/C-2-B District at 801 H Street, N.E. (Square 912, Lot 55). Accordingly, it is therefore **ORDERED** that the appeal is **DENIED**, subject to the proviso that the certificate of occupancy should be **REISSUED** to correct the approved use from “Market-M” to “grocery” consistent with the Zoning Regulations.

⁴ The definition is: **Fast food establishment** – a place of business, other than a “prepared food shop,” where food is prepared on the premises and sold to customers for consumption and at least one of the following conditions apply:

- (a) The premises include a drive-through;
- (b) Customers pay for the food before it is consumed. One characteristic that would satisfy this element would be building permit plans that depict a service counter without seating unless the applicant certifies that the intended principal use is for a restaurant or grocery and that the counter is part of a carry out service that is clearly subordinate to that principal use; or
- (c) Food is served on/in anything other than non-disposable tableware. Characteristics that would satisfy this element include, but are not limited to: the building permit plans do not depict a dishwasher or do depict trash receptacles in public areas.

A proposed or existing establishment meeting this definition shall not be deemed to constitute any other use permitted under the authority of these regulations, except that a restaurant, grocery store, movie theater, or other use providing carryout service that is clearly subordinate to its principal use shall not be deemed a fast-food establishment.

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VOTE: **3-0-2** (Nicole C. Sorg, Jeffrey L. Hinkle, and Konrad W. Schlater to Deny;
Meridith H. Moldenhauer and one Board member (vacant) not
participating)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of Board members approved the issuance of this order.

ATTESTED BY:


JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: MAY 24 2011

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT
UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

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MAY 24 2011

As Director of the Office of Zoning, I hereby certify and attest that on _____, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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